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IN THE

# SUPREME COURT OF THE UNITED STATES.

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THE UNITED STATES OF AMERICA *ex Rel.* GEORGE L. FOREMAN, PETITIONER,

*vs.*

GEORGE VON L. MEYER, SECRETARY OF THE NAVY, RESPONDENT.

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## PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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PATRICK H. LOUGHRAN,
*Barrister Building, Washington, D. C.,*
*Attorney for the Petitioner.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES OF AMERICA *ex Rel.* GEORGE L. FOREMAN, PETITIONER,

*vs.*

GEORGE VON L. MEYER, SECRETARY OF THE NAVY. RESPONDENT.

## PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully represents as follows:

First.

That on or about December 18, 1912, a petition for writ of error to the Court of Appeals of the District of Columbia to review, under section 250 of the Judicial Code, that court's decision in the above-entitled cause (38 App. D. C., 472) was presented to the Honorable Chief Justice of the Supreme Court of the United States. The said petition was returned to counsel for petitioner, leave being granted him by the Chief Justice to submit the petition in open court with printed brief in support thereof, after reasonable

notice to counsel for respondent. As shown by acknowledgment of service appended hereto, counsel for respondent were notified on January 8, 1913, that on the 27th day of January, 1913, or as soon thereafter as petitioner's counsel can be heard, petition for the writ, and brief in behalf of it, would be presented. The petition and the brief in support of it (thirty copies) are presented herewith under the same cover, and are accompanied with nine copies of the transcript of the record in the Court of Appeals of the District of Columbia.

Second.

The proceedings in the cause and a statement of the questions raised and adjudicated in the courts below are stated, on behalf of the petitioner, as follows:

On March 11, 1911, George L. Foreman filed in the Supreme Court of the District of Columbia a petition for mandamus to compel the Secretary of the Navy to record Foreman's name upon the register of retired officers of the Navy as a paymaster's clerk from the 27th day of June, 1910. The petition alleged that—

> "the acts of the respondent in refusing to place your petitioner's name upon the register of retired officers of the Navy are arbitrary and contrary to law,"

and have deprived him—

> "of enjoyment of a right under the laws of the United States,"

and that his—

> "right to retirement is established by his appointment, acceptance, and agreement, oath, and service aforesaid (all as paymaster's clerk), and by the provisions of section 1444, Revised Statutes of the United States and the act of Congress of June 24, 1910 (36 Stat., 606)." (See Record, pp. 7 to 13, inclusive.)

The case was argued and submitted under a demurrer to the respondent's answer. The court overruled the demurrer, saying, in part (see Record, pp. 2 to 6, inclusive):

> "The relator claims that he is entitled to be retired under section 1444, Revised Statutes, because he has reached the age of sixty-two years. It is not at all clear that he could be retired under that section, or that it was the intention of Congress that a paymaster's clerk should be included therein. Section 1445, Revised Statutes, provides that certain officers therein named shall not be placed upon the retired list, except on account of physical or mental disability, and they are excepted from those entitled to retirement under section 1444. Among those officers so excepted are assistant paymasters and passed assistant paymasters, and it would hardly be supposed that Congress intended that officers in the pay department of the Navy, of less rank than assistant paymasters, should have the benefit of such retirement, while their superiors were expressly excluded from such benefit.
>
> "It seems to me to be very questionable whether the Secretary of the Navy can retire any paymaster's clerk under the facts contained in the answer of the respondent herein, and equally doubtful whether the relator has a right to retirement under the said sections, as claimed by him in his petition; and the whole subject is so debatable that it does not seem competent for the court in a mandamus proceeding to direct the Secretary as prayed in the petition."

Thereafter an amended petition was filed containing the same allegations as those quoted hereinbefore from the original petition (see Record, pp. 7 to 13, inclusive). The answer to the amended petition contains, *inter alia*, the following (see Record, pp. 21 to 30, inclusive):

> "Further answering the said amended petition, the defendant avers that for years past the officials of the Navy Department and the officials of the Treasury Department who have charge of the pay of persons appointed to hold similar positions to those held by

the petitioner, have construed the appointment and position of such persons to be that of a civil employee, and not as an officer of the Navy. The defendant is informed and believes, and therefore avers, that at no time since the fourteenth day of August, A. D. 1893, has the petitioner been paid as an officer of the Navy, nor has the pay received by him come out of the appropriations made by Congress from which officers of the Navy are paid, but that the said George L. Foreman has at all times since September 11, A. D. 1893, been paid out of the appropriation known as 'Pay Miscellaneous,' from which civilian employees in Navy pay offices, as that at San Francisco, California, only are paid.

"The defendant further avers that he is without authority or warrant of law to place the name of the petitioner upon the register of retired officers of the Navy as paymaster's clerk from the 27th day of June, A. D. 1910, as the petitioner is not entitled to such retirement, and was not upon such date, nor during the time referred to in the petition in this cause a paymaster's clerk, United States Navy, nor did said petitioner during such times hold any office which entitled him to retirement as prayed.

"The defendant further avers that the determination of the question whether the petitioner is entitled to be retired as paymaster's clerk, United States Navy, is a matter that rests within the judgment and discretion of the President of the United States of America, under the provisions of section 1444 of the Revised Statutes of the United States."

Such answer was met by demurrer, and under the demurrer the case was again argued and submitted. Again the court ruled against the petitioner, saying, in part (see Record, pp. 34 to 36, inclusive):

"This legislation, antedating the enactment of said section 1444 in Revised Statutes of 1878, indicates that it was not contemplated by Congress that officers were to be retired on reaching the age of sixty-two years, unless they had been continuously in the service for forty-five years, and for that reason, the re-

> lator, even if he is an officer within the meaning of that section, which is questionable, fails to show a clear case entitling him to the right of retirement, or a plain administrative duty on the part of the Secretary of the Navy to place his name on the list of retired officers."

From the foregoing it is evident that the Supreme Court of the District of Columbia, in its second opinion, receded from the position taken in its first opinion. The court's first ruling was that Foreman was not entitled to retirement, because section 1444 expressly excluded from retirement for age certain officers in the pay department of rank higher than a paymaster's clerk and, therefore—

> "it would hardly be supposed that Congress intended that officers * * * of less rank * * * should have the benefit of such retirement while their superiors were expressly excluded from such benefit."

The court's second ruling was to the effect that—

> "even if he is an officer within the meaning of that section (sec. 1444)"

the fact that it is not shown that he—

> "had been continuously in the service for forty-five years"

is, in itself, sufficient to prevent his retirement under that section—in other words, in the second opinion the court ruled that no officer is eligible for retirement under section 1444 unless he—

> "had been continuously in the service for forty-five years"

prior to attaining the age of sixty-two years.

*In neither of the said two opinions, however, was it affirmatively held that Foreman, as a paymaster's clerk, was not an officer of the Navy.*

An appeal was taken to the Court of Appeals of the District of Columbia, which court on April 1, 1912 (38 App. D. C., 472) affirmed the Supreme Court of the District of Columbia, saying, in part:

> "He (petitioner) was no more an officer of the Navy than any one of the many employees of the Navy Department at Washington. We rule therefore that he never possessed any right to retirement."

The opinion of the Court of Appeals is radically different from the two opinions by the Supreme Court of the District, which two opinions are also different from each other, thus showing three different and wholly dissimilar views of the case; first, that the petitioner is not entitled to retirement because as a paymaster's clerk he was of less rank than an assistant paymaster; second, that he is not entitled to retirement as a paymaster's clerk because he had not served forty-five years in the Navy; third, *that he is not entitled to retirement because he never was a paymaster's clerk, although expressly appointed and serving as such.*

Application was made to the Court of Appeals for removal of the cause to the Supreme Court of the United States on writ of error. On May 6, 1912, such application was denied.

## ARGUMENT.

The attention of the court is respectfully invited to what is shown by the pleadings in this case.

In relator's pleadings it was alleged that there existed a duty resting upon the Secretary of the Navy to cause the relator's retirement to be effected and that the performance of such duty was made mandatory by an act of Congress; and, further, that retiring the relator was a purely ministerial act, made so *by the undisputed appointment and service of the relator as a paymaster's clerk and his having attained the age of sixty-two years.* It was further alleged in those pleadings that the respondent had arbitrarily refused to perform that ministerial duty *and that by such refusal the relator had been effectually deprived of the enjoyment of a right under a law of the United States.*

The pleadings on behalf of the respondent alleged that the respondent was without any lawful power or duty whatever to promote or effect the retirement of the relator and that the authority the respondent had and exercised with respect to the retirement of officers of the Navy did not extend to and include persons appointed and serving as paymasters' clerks, as the relator had been appointed and served; *that although expressly appointed and sworn and serving as a paymaster's clerk, the relator was nevertheless always merely a civil service employee.*

At pages 13, 14 and 15 of transcript of the record in the Court of Appeals will be found (Exhibits "A," "B," "C," and "E") *unquestioned copies* of the relator's appointment as "paymaster's clerk," his acceptance and agreement as "paymaster's clerk, U. S. N.," his oath of office as "paymaster's clerk, U. S. N.," and a memoranda showing that he was carried on the pay-rolls of the Navy Department from September 11, 1893, to November 30, 1908, as "pay clerk." The relator was holding office under this appointment when, on July 1, 1906, he attained the age of 62 years, the age for retirement prescribed by section 1444, Revised Statutes. (See Record, p. 9.)

The issues as made by the pleadings were as follows:

1. Did the relator's appointment, oath, acceptance and agreement as a "paymaster's clerk" give him the status and rights of such clerk or constitute him only a mere civil service employee?

2. Did the relator's appointment and service as a "paymaster's clerk" make him an officer of the Navy within the meaning of section 1444, Revised Statutes?

3. Was the relator arbitrarily deprived of a right under a law of the United States when the respondent refused to present his name to the President for retirement under said section?

4. Was the relator a paymaster's clerk within the meaning of the act of June 24, 1910 (30 Stat., 606), on the date of enactment of that statute?

5. Was he arbitrarily deprived of a right under that statute when his application for retirement thereunder was denied by the respondent?

6. Was not the respondent authorized and expressly directed by law to cause the relator to be retired under the admitted facts in the case; and was not respondent's refusal to do so an arbitrary refusal on his part to perform a purely ministerial act?

7. *Did there not exist a power in and a duty resting upon the Secretary of the Navy to cause the relator to be retired, and was not that power arbitrarily withheld from exercise and was not that duty arbitrarily disregarded in and by the refusal of the respondent to cause retirement to be made?*

We submit that the pleadings directly drew in question the existence of a power and duty in the Secretary of the Navy to effectuate an alleged vested right of a citizen under a law of the United States, and that, therefore, the decision of the Court of Appeals of the District of Columbia, in the present case, is reviewable by the Supreme Court of the United States under the fifth subdivision of section 250 of the Judicial Code, which reads as follows:

> "Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question."

If it was the intention of Congress to deny *the right* of review by the Supreme Court of the United States, *under writ of error, to litigants* in cases presenting issues of the character of those made in the present case, certainly it was never the intention of the law-making body wholly to deprive that court of all jurisdiction with respect to such cases, for by the terms of section 251 of the Judicial Code the court is given jurisdiction—

> "in *any* case in which the judgment or decree of said Court of Appeals is made final by the section last preceding * * * to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court."

Therefore it would seem that the Supreme Court would have jurisdiction in a case of this character to review and determine by certiorari, if in its judgment it would be proper to do so if there existed no right in the litigants to invoke review by writ of error. Whether review in a case of this character is a matter of right by way of writ of error or a matter resting in the discretion of the court to be exercised in action on a petition for certiorari will, therefore, it is believed, be determined by the court in its opinion upon the merits of the present petition for writ of error. Determination of that question by the court should be not less desired by the Government than by other parties to proceedings in which the acts of Government officers are drawn in question.

Respectfully submitted,

GEORGE L. FOREMAN,
By PATRICK H. LOUGHRAN,
*His Counsel.*

The petitioner had filed his petition for writ of mandamus to compel the Secretary of the Navy to record his name "upon the register of retired officers of the Navy as paymaster's clerk from the 27th day of June, 1910."

There was an answer to the petition, to which a demurrer was introduced; and petitioner electing to stand on his demurrer, an order of dismissal followed, which order was affirmed by the Court of Appeals of the District of Columbia.

The prayer of the petition is not that he shall be retired, but that his name shall be placed upon the register of retired officers of the Navy. The petitioner bases this claim, first, upon section 1444 of the Revised Statutes, which provides:

> When an officer below the rank of vice admiral is 62 years old, he shall, except in cases provided in the next section, be retired by the President from active service.

also upon the provisions of the act of June 24, 1910 (36 Stat. L. 606), amending the act of May 13, 1908, which provides:

> All paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowance and have the same rights of retirement as warrant officers of like length of service in the Navy.

The case as made out by the pleadings is substantially as follows:

In 1893 petitioner was appointed paymaster's clerk, for duty at the Navy pay office, San Francisco,

and he continued in such office until November, 1908, when, being then more than 62 years old, he was promoted to chief clerk at said pay office, which position he accepted, and served under this appointment until April, 1909, when he requested retirement under section 1444, Revised Statutes, which application was denied by the Secretary of the Navy. In November, 1910, he again requested retirement under the act of June 24, 1910, which request was also denied; and in January, 1911, he tendered his resignation, which was accepted.

The answer denies that the petitioner was at any time a paymaster's clerk in the Navy since 1893, and avers that he was in fact a civil employee and paid as such at a compensation greater than that to which a paymaster's clerk would be entitled. The answer also sets out facts showing that the Navy pay office at San Francisco is not such a station as would authorize the employment of a regular paymaster's clerk. The answer further avers that in 1896 the petitioner was placed on the classified civil service, and that by virtue of his appointment in 1893 he became a civil employee, and not an officer in the Navy, and therefore not entitled to retirement.

The contention of the petitioner is that the Secretary of the Navy, in refusing his application for retirement, misconstrued the provisions of the law above quoted, and denied him a right to which he was entitled. We submit that what is thereby drawn in question is, not the existence or scope of the

power or duty of the Secretary of the Navy, but that the Secretary erred in the administration of a statute.

This case is analagous to the case of *Snow* v. *United States*, 118 U. S. 346, which was dismissed in this court for want of jurisdiction. It was there contended that a court, established by an act of Congress and admitted to have lawful existence and jurisdiction of a case, misconstrued the act and went beyond the authority which it conferred; but it was held that all that was drawn into question was whether there was or was not error in the administration of the statute, and not "the validity of an authority exercised under the United States."

The court said:

> From the fact that a given criminal case involves the construction of a statute of the United States, it does not follow that the validity of "an authority exercised under the United States" is drawn in question.

In the case of *South Carolina* v. *Seymour*, 153 U. S. 353, the court refused a writ of error to review a case denying a writ of mandamus against the Commissioner of Patents, who had decided against issuing a trademark, upon the ground that, as the authority of the Commissioner of Patents was not assailed, but only his construction and interpretation of the law questioned, there was not drawn in question the validity of a statute of, or authority exercised under, the United States.

This court said:

> In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States, must be directly drawn in question.

A similar decision refusing to entertain jurisdiction of a writ of error to the Supreme Court of the District of Columbia, upon the ground that the validity of an authority exercised under the United States was drawn into question, was rendered in the case of *United States* v. *Lynch*, 137 U. S. 280, wherein a mandamus was sought against the accounting officers to require such officers to allow a claim for mileage which they had refused, under the act of 1835 and the decision of this court in relation to it. This court said:

> The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.

This court in the *Lynch case* (*supra*) showed the distinction between an erroneous construction of a law by a Government officer, of which cases this court would not take jurisdiction on writ of error, and the cases where it would take jurisdiction,

namely, where the authority was directly questioned. In so doing the court said:

> In *Clayton* v. *Utah Territory*, 132 U. S. 632, the power vested in the governor of the Territory of Utah by the organic act, to appoint an auditor of public accounts, was drawn in question; and in *Clough* v. *Curtis*, 134 U. S. 361, 369, the lawful existence, as the legislative assembly of the Territory of Idaho, of a body of persons claiming to exercise as such the legislative power conferred by Congress, was controverted. * * * The existence or validity of the authority was primarily involved in these cases, and they contain nothing to the contrary of our present conclusion.

The authority of the respondent, the Secretary of the Navy, or his power or duty, is not drawn into question. The claim of the petitioner is that in the exercise of such authority the respondent erred and misconstrued the statute. Such a case is, we submit, clearly within the foregoing decisions where a writ of error was refused.

**THE QUESTION SOUGHT TO BE REVIEWED IS A QUESTION OF FACT.**

The petitioner bases his claim for a writ of mandamus to compel the Secretary of the Navy to place his name upon the register of retired officers of the Navy as paymaster's clerk on his appointment in 1893 and his service from that date to June 27, 1910, also upon his two applications to the Secretary of the Navy for such retirement, one under section

1444 of the Revised Statutes, and the other under the act of May 13, 1908, as amended by the act of June 24, 1910, both of which applications were denied.

The first refusal of the Secretary of the Navy states:

> The records of the department show that you have been employed as a civilian under the classified civil service since May 6, 1896. As you are not in the service as an officer in the Navy, you can not be transferred to the retired list as requested by you.

The second refusal of the Secretary of the Navy states:

> Mr. Foreman is a civil employe and therefore has no status for retirement under the laws governing retirement in the Naval service.

The Court of Appeals of the District of Columbia, in affirming the decision of the lower court, overruling a demurrer to the answer of the Secretary of the Navy and dismissing the petition for mandamus, said:

> He (Foreman) was at no time a paymaster's clerk in the technical sense but at all times attached to the particular office. He was no more an officer of the Navy than any one of the many employees of the Navy Department at Washington. We rule, therefore, that he never possessed any right to retirement. (38 App. D. C. 476.)

DISTRICT OF COLUMBIA, *ss:*

Patrick H. Loughran, being first duly sworn, makes oath that he prepared and has read the foregoing petition and knows the contents thereof, and that he subscribed same as counsel for George L. Foreman, the petitioner; that the statement of facts therein made as upon personal knowledge are true, and that those statements of facts made upon information and belief he believes to be true.

PATRICK H. LOUGHRAN.

Subscribed and sworn to before me this 7th day of January, 1913.

[SEAL.] EMILY F. CAMP,
*Notary Public.*

*To Hon. George W. Wickersham, Attorney General of the United States, and Clarence R. Wilson, Esq., United States Attorney for the District of Columbia:*

You are respectfully hereby notified that I will, on the 27th day of January, 1913, immediately after the opening of the court on that date, or as soon thereafter as may be convenient for the court to hear me, present to the Supreme Court of the United States the foregoing petition and brief for a writ of error to the Court of Appeals of the District of Columbia to have reviewed the judgment of that court in United States *ex rel.* George L. Foreman *vs.* George von L. Meyer, Secretary of the Navy (38 App. D. C., 472).

I beg leave to suggest that all intended opposition to the petition be made in a brief to be submitted at the time of presenting the petition, right of reply to any opposition being hereby waived.

PATRICK H. LOUGHRAN,
*Attorney for George L. Foreman,*
*Petitioner (and Relator).*

Receipt of a true and complete copy of the foregoing notice, petition, and brief on this 8th day of January, 1913, is hereby acknowledged by each of the undersigned.

WM. MARSHALL BULLITT,
*Solicitor General.*
CLARENCE R. WILSON,
*U. S. Attorney D. C.*
V. G.

# In the Supreme Court of the United States.

OCTOBER TERM, 1912. No.—

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UNITED STATES OF AMERICA EX REL. GEORGE L. FOREMAN, *Petitioner*,

*v.*

GEORGE VON L. MEYER, SECRETARY OF THE NAVY, *Respondent.*

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*ON PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.*

---

**BRIEF OF RESPONDENT IN OPPOSITION TO PETITION.**

This is not a case where the validity of an authority under the United States or the existence or scope of a power or duty of an officer of the United States is drawn in question, but the petitioner seeks by writ of error to have this court *review a question of fact.*

The petitioner, George L. Foreman, seeks a writ of error under the fifth clause of section 250 of the Judicial Code, to the Court of Appeals of the District of Columbia, to review the decision of that court in the above-entitled cause, which decision is reported in 38 Appeals, District of Columbia, 472.

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We therefore submit that the question which is now sought to be reviewed by this court upon a writ of error is purely and solely a question of fact—whether Foreman was an officer in the Navy and hence entitled to retirement or whether he was a civilian employee. The Secretary of the Navy and the court below found against him upon this question of fact, and he is precluded thereby on writ of error to the Supreme Court.

The writ of error herein sought should be denied.

WM. MARSHALL BULLITT,
*Solicitor General.*
CLARENCE R. WILSON,
*United States Attorney, D. C.*
REGINALD S. HUIDEKOPER,
*Assistant United States Attorney, D. C.*

JANUARY 20, 1913.

# UNITED STATES EX REL. FOREMAN *v.* MEYER, SECRETARY OF THE NAVY.

PETITION FOR WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Submitted January 27, 1913.—Decided February 24, 1913.

*Champion Lumber Co.* v. *Fisher*, *ante*, p. 445, followed as to the construction of subd. 5 of § 250 of Judicial Code regulating the review by this court of judgments of the Court of Appeals of the District of Columbia.

The validity and scope of the authority of an officer of the United States is not drawn in question where the controversy is confined to determining whether the facts under which he can exercise that authority do or do not exist.

Writ of error to review 38 App. D. C. 472, denied.

THE facts, which involve the construction of § 250 of the Judicial Code of 1911 and the jurisdiction of this

court to review judgments of the Court of Appeals of the District of Columbia, are stated in the opinion.

*Mr. Patrick H. Loughran* for petitioner.

*The Solicitor General, Mr. Clarence R. Wilson*, United States Attorney, and *Mr. Reginald S. Huidekoper* in opposition.

MR. JUSTICE DAY delivered the opinion of the court.

Foreman filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of the Navy to record his name upon the register of retired officers of the Navy as a paymaster's clerk from the twenty-seventh of June, 1910. An answer having been filed, to which the petitioner interposed a demurrer, the Supreme Court, upon the petitioner electing to stand on his demurrer, entered an order of dismissal, which was affirmed by the Court of Appeals (38 App. D. C. 472). A writ of error to this court having been refused by the Court of Appeals, this petition was filed here.

The petitioner claimed that he was an officer below the rank of vice-admiral, sixty-two years old, and entitled, under § 1444 of the Revised Statutes, to be retired from active service, and also claimed that he was entitled to the benefits of the act of June 24, 1910 (36 Stat. 605, 606, c. 378), providing that all paymasters' clerks shall, while holding appointment in accordance with law, receive pay and allowance and have the same rights of retirement as warrant officers of like length of service in the Navy.

It appears that the petitioner was appointed paymaster's clerk in 1893 for duty at the Navy Pay Office at

San Francisco, California, which was and is a purchasing paymaster's office, where he continued until November 20, 1908, receiving an annual compensation of $2,000, which was paid from the appropriation entitled "Pay, Miscellaneous," when he was notified by the Acting Secretary of the Navy of his promotion to chief clerk in the same pay office, which position the petitioner accepted and in which he served until April 17, 1909, when he filed his application for retirement as an officer of the Navy under § 1444, having attained the age of sixty-two years on July 1, 1906. This application was denied. On November 14, 1910, he petitioned for retirement under the act of June 24, 1910. This petition also was denied. On December 14, 1910, the petitioner's request for leave without pay was approved by the Department, and he was notified that if he was unable to report for duty by December 31, 1910, his resignation would be accepted, otherwise he would be discharged. On January 7, 1911, petitioner tendered his resignation, under protest, which was accepted.

After considering the various statutes the Court of Appeals reached the conclusion that the petitioner was not a paymaster's clerk within the meaning of the law, and said (p. 476):

"Appellant was appointed 'for duty at the Navy Pay Office' at San Francisco, a purchasing paymaster's office. He received an annual salary of $2,000 from 1893 to 1908, instead of $1,300, to which he would have been entitled had he been appointed under the provisions of sec. 1386 [which provides for the appointment of regular paymaster's clerks]. His promotion in 1908 did not affect his status, since he was at no time a paymaster's clerk in the technical sense, but at all times attached to the particular office. He was no more an officer of the Navy than any one of the many employés of the Navy Department at Washington.

"We rule therefore that he never possessed any right to retirement. Upon the other questions suggested, it is unnecessary to express an opinion."

The decision therefore rested upon the denial of the contention that petitioner was a paymaster's clerk and entitled to the benefit of the statutes governing such cases.

This case, like the one just decided, *Champion Lumber Co.* v. *Fisher*, *ante*, p. 445, is sought to be brought here under § 250 of the Judicial Code because it is said to be a case in which the validity of an authority exercised under the United States or the existence or scope of the power or duty of an officer of the United States is drawn in question. From what we have said of the character of the case made and decided, we think it is apparent that no such validity was drawn in question, nor was the existence or the extent or scope of the power or duty of an officer of the United States challenged or decided.

The case was made and a decision was had in the Court of Appeals upon the issue whether under the statutes invoked by the petitioner as the ground of his right to the relief sought, he was or was not a paymaster's clerk entitled to be entered upon the register of retired officers of the Navy. Applying the principles just announced in deciding the case of *Champion Lumber Co.* v. *Fisher*, *ante*, p. 445, *the petition for writ of error in this case must be denied.*